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IN THE

Supreme Court of the United States

OCTOBER TERM 1951.

No. 179.

OSTERMAN & HUTNER, GOLDMAN, SACHS & CO., GRAHAM-NEWMAN CORPORATION, NEWMAN & GRAHAM, and ABRAHAM & CO.,

Petitioners,

—against—

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under the First Consolidated Mortgage Deed of The Rio Grande Western Railway Company, dated April 1, 1899, JULIUS KLORFEIN, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee under the Refunding and Improvement Mortgage of The Denver and Rio Grande Western Railroad Company, dated February 1, 1924, CITY BANK FARMERS TRUST COMPANY, as Trustee under The Denver and Rio Grande Western Railroad Company's General Mortgage, dated February 1, 1924, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, and HAROLD S. BAIRD,

Respondents.

BRIEF ON BEHALF OF RESPONDENT, CITY BANK FARMERS TRUST COMPANY, AS TRUSTEE, UNDER THE GENERAL MORTGAGE DATED FEBRUARY 1, 1924, MADE BY THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY.

Opinions Below.

[Figures in parentheses refer to folios of Record in the New York courts.]

Although the petition refers to only one opinion below—that at page 179 of the Record (535-552), there was another opinion of the Supreme Court of the State of New York (New York County), the

second (553-564) being that of September 14, 1950. On the latter was based the order denying intervention to the petitioners, Osterman & Hutner, *et al.* Neither opinion was officially reported.

On February 27, 1951, both orders were affirmed by the Appellate Division, First Department, the second with slight modification. See 278 App. Div. 650, memorandum opinions Nos. 3 and 4.

On April 24, 1951, the motion of these petitioners for leave to appeal to the Court of Appeals was denied by the Appellate Division at 278 App. Div. 765. Leave to appeal also was denied by the Court of Appeals on June 1, 1951, without opinion, memorandum decision not yet reported.

Questions Presented.

The first question presented is whether these petitioners have any standing to file a petition for writ of certiorari.

A second question is whether any principle of federal law deprives the New York courts of jurisdiction to grant allowances for services performed in independent litigation in the New York courts to be paid out of the fund being administered by the New York courts.

A third question is whether this Court should review a state court decision resting upon a non-federal ground which independently and adequately supports the state court judgment.

Statement.

The New York action was commenced in 1947 by the trustee under the Rio Grande Western Railway Company First Consolidated Mortgage to foreclose a lien on 100,000 shares of Utah Fuel Company stock pledged thereunder in 1901. This respondent, City Bank Farmers Trust Company, as trustee under The Denver and Rio Grande Western Railroad Company (herein called the "D&RGW") General Mortgage, admittedly a holder of a lien on the Utah Fuel stock, was named a defendant, together with other parties.

On March 4, 1949 the Supreme Court of the State of New York entered an interlocutory judgment (373-401) and on September 23, 1949 the same court entered a final decree (403-533). By paragraph (3) of such final decree the New York court held, in part, as follows:

> "(3) That this Court hereby reserves jurisdiction to make such allowances as may be just and lawful for the payment of * * * the fees or other compensation and expenses of * * * any party to this action who may by law be entitled thereto, out of the proceeds of sale. After payment of said fees, compensation and expenses, the remainder of the proceeds of said sale shall be distributed as follows: * * *" (483).

By paragraph (5) of said final decree it held as follows:

> "(5) That this Court hereby reserves jurisdiction to determine all questions relating to costs, compensation, allowances, disbursements and ex-

penses in connection with this action and the sale to be made pursuant to this Final Judgment and Decree and all questions relating to the enforcement of this Final Judgment and Decree." (491-2)

No party to the action objected to either of the above-quoted provisions of the final decree. Appeals were taken on other grounds, but the final decree was affirmed by the Appellate Division, First Department, on May 23, 1950, 277 App. Div. 767, 97 N. Y. S. 2d 542; and by the Court of Appeals on March 8, 1951, 302 N. Y. 658, 98 N. E. 2d 474.

In the meantime, on April 11, 1950, pursuant to said interlocutory judgment, the Utah Fuel stock was sold at public auction for $6,800,000.

On June 28, 1950 the petitioners, Osterman & Hutner, a brokerage firm, wrote to Justice Pecora (88) of the Supreme Court of the State of New York (New York County), making the contention that any allowances for services in the New York litigation should be made by the federal reorganization court and paid by the reorganized D&RGW.

On June 30, 1950 Justice Pecora's secretary replied to this brokerage firm, stating that it was the court's feeling that Osterman & Hutner's position should be presented through counsel (80).

On July 5, 1950 the brokerage firm again wrote to the New York court stating it was delaying until after July 27, 1950 any application for intervention (81).

On August 7, 1950 Osterman & Hutner employed counsel who communicated with the New York court and "found that Judge Pecora had already prepared his decision" (82).

On August 8, 1950 Justice Pecora filed his opinion granting allowances to certain parties and their counsel for services in the New York litigation (535, 552).

On or after August 9, 1950 these petitioners filed a notice of motion in the New York courts for leave to intervene. That motion was denied by the New York court (553-564; 44-51). Subsequently the Appellate Division modified the order "to the extent of granting the application to intervene, *for the purpose of this appeal* * * *" (278 App. Div. 650; emphasis supplied).

The petitioners base their objections to the New York court's action upon provisions of a Consummation Order entered in a federal reorganization case in which the D&RGW was reorganized. Here also a brief chronological outline is of interest:

October 24, 1943—The District Court entered its Approval Order, approving the plan of reorganization (herein called the "Plan") of the D&RGW and held it to be fair and equitable.

November 1, 1944—The District Court entered its Confirmation Order, which confirmed the Plan, following the vote of creditors, and repeated the holding that the Plan was fair and equitable.

June 10, 1946—This Court affirmed the Approval Order and the Confirmation Order, in *R. F. C.* v.

Denver & RGWR Co., 328 U. S. 495. The Plan was that previously formulated by the Interstate Commerce Commission, so approved and confirmed, as interpreted by this Court's June 10, 1946 opinion.

April 10, 1947—The District Court's Consummation Order was entered.

ARGUMENT.

I.

The petitioners have no standing to file the petition.

The order of the Appellate Division, unanimously affirming the lower court's order denying the petitioners' application for leave to intervene, modified that order to the extent only of allowing intervention for the purpose of "this appeal"—*i. e.,* the appeal to the Appellate Division from the order granting allowances. The Appellate Division said, however:

> "* * * we think Special Term was justified, in the exercise of discretion, in denying the application of Osterman & Hutner, *et al.* for leave to intervene as parties to the action." (278 App. Div. 650)

That limited purpose (of intervention for the purpose of having the appeal considered by the Appellate Division) was fully availed of. Intervention was denied for all other purposes. The Court of Appeals refused to consider an appeal by the petitioners.

The attempted intervention was not timely, whether considered in relation to the final judgment of September 23, 1949 or the decision of August 8, 1950, granting allowances, and the order entered thereon on September 14, 1950.

Of course, even if these petitioners had been permitted to intervene, they would have entered the litigation subject to all action therein prior to their application to intervene. This means that they would have entered subject to the determination made in the final decree of September 23, 1949 whereby the court provided for the making of allowances for "compensation and expenses * * * of any party to this action who may by law be entitled thereto, out of the proceeds of sale" (483).

Nor can it be claimed by the petitioners that the decree provision that compensation would be awarded to parties "by law entitled thereto" was not interpreted by them as meaning that allowances would be made to the parties enumerated in the September 14, 1950 allowance order. First, the fact that petitioners may have incorrectly construed the 1949 final decree does not change its legal significance or the consequences flowing from it. In addition, the petitioners were entirely familiar with the construction being placed on the final decree by the other parties and they had been advised by the court that, if they wished to present their views to the court, they should do so through counsel.

When these petitioners at last did make application to intervene, the decision of the New York court had already been announced. First, they relied on a backdoor attempt to forestall the granting of allowances

out of the fund in court. Then, after a decision adverse to their contention, they attempted to intervene and have the question re-litigated. Justice Pecora in his decision denying leave to intervene stated (563-4):

> "Hence, if these movants are not indeed barred by the rule of *res adjudicata,* they are by their *laches.*"

II.

The petitioners have failed to show that a federal question is presented or any grounds for disregarding in this case the general and proper principle of equitable procedure, that a fund should bear the expenses of its own administration.

The established principle of equitable procedure that a fund should bear the expenses of its own administration has been developed over the years in cases well known to this Court. See *Trustees* v. *Greenough* (1881), 105 U. S. 527; *Sprague* v. *Ticonic Bank* (1939), 307 U. S. 161. The petitioners apparently do not question such general equity power but ask this Court to review its exercise by the New York courts on the ground that the reorganization court had exclusive jurisdiction to determine allowances in the New York litigation.

The petitioners suggest that something in the Consummation Order entered in the reorganization case on April 10, 1947 had the effect of embodying in the Plan new provisions limiting the rights of the three mortgage trustees in connection with any independent suit that might be filed to foreclose on the Utah Fuel stock. Furthermore, they assert that the Consum-

mation Order provisions had the effect of altering the Plan, and of holding that the Plan, with such new provisions included, would be fair and equitable—but that, without these new provisions, the Plan would not be fair and equitable. Obviously the Consummation Order, a procedural order, entered almost one year after this Court had approved, confirmed and interpreted the Plan, could not change the Plan.

It is clear from an examination of the Consummation Order (186-8, 197-202) that the purpose of the provisions relied upon by the petitioners was solely to give the three mortgage trustees an equitable substitute for the protection previously furnished them by their respective liens on the D&RGW assets. Even this respondent, the most junior General Mortgage trustee, had had a lien—prior to that of the General Mortgage bonds—upon assets which were sufficiently valuable to warrant the issuance of $4,354,816 par value of new common stock, which the New York court found to have an "actual value" as of the date of distribution of $430,038 (441). After the Plan was consummated, the mortgage trustees would no longer be able to rely upon their respective liens on the railroad property for their compensation and expenses. It was always possible that a court taking jurisdiction of the litigation to be brought for foreclosure on the Utah Fuel stock might take the view (as was in fact urged by at least one of the parties to the New York case) that unsuccessful litigants, even though indenture trustees and necessary parties, should not receive compensation out of the proceeds of sale of the Utah Fuel stock.

The two decisions of this Court (*Brown* v. *Gerdes*, 321 U. S. 178, and *Leiman* v. *Guttmann*, 336 U. S. 1),

relied upon by petitioners as establishing exclusive jurisdiction in the reorganization court to fix and pay the compensation of parties to the state court action, are not in point. Both decisions relate to services rendered in a federal reorganization proceeding. In the first case, attorneys had been appointed by the bankruptcy court to bring suit in a state court upon causes of action constituting assets of the bankruptcy estate. In the second case, a stockholders' committee had entered into a private agreement with its attorneys to pay them compensation for services in the reorganization proceeding in addition to the fees allowed out of the general estate of the debtor. It is clear that the facts in the present case are entirely dissimilar.

Here the reorganization court, in entirely separate litigation, in which the court did not have jurisdiction of the *res* (the Utah Fuel stock) nor of at least one of the necessary parties (Alexander, as trustee), obviously would not and could not rob the New York courts of jurisdiction that under fundamental equity principles is theirs. This jurisdiction (of the *res* and of the parties) was as completely independent of the reorganization proceeding as if that reorganization proceeding had never occurred. The New York courts had exclusive jurisdiction to determine the rights in the stock, to direct its sale and to order the disposition of its proceeds. No federal question is presented.

III.

This Court has established a rule that it will not review a state court decision resting upon a non-federal ground which independently and adequately supports the state court.

This rule was stated by Mr. Justice Sutherland in *Fox Film Corporation* v. *Muller* (1935), 295 U. S. 207, at p. 210, where he held:

> "* * * the case is controlled by the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment."

Also see the cases there cited and *Herb* v. *Pitcairn* (1944), 324 U. S. 117, 125.

The New York court decision refusing intervention to these petitioners was based, *inter alia,* upon the principles of *res judicata* and *laches* (563-4). Both of these grounds, independently and adequately, support the state court judgment. Neither of these grounds involves a federal question. Thus, whether or not other grounds here urged by the petitioners have merit (and this respondent submits they do not), the action of the New York courts may be fully sustained under the doctrine either of *res judicata* or of *laches,* as applied by the New York courts.

Conclusion.

The petitioners, Osterman & Hutner, *et al.*, have no standing to file a petition for writ of certiorari herein. Moreover, assuming that this were not so, the petition should be denied because (a) it fails to state a federal question, and (b) the decision of the New York courts is, in any event, independently and adequately supported by non-federal grounds for such decision.

Respectfully submitted,

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MITCHELL, CAPRON, MARSH,
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July 31, 1951.

AUG 21 1951
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1951

No. 179

OSTERMAN & HUTNER, GOLDMAN SACHS & Co., GRAHAM-NEWMAN CORPORATION, NEWMAN & GRAHAM, and ABRAHAM & Co.,

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GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under the First Consolidated Mortgage Deed of THE RIO GRANDE WESTERN RAILWAY COMPANY, dated April 1, 1899, JULIUS KLORFEIN, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee under the Refunding and Improvement Mortgage of The Denver and Rio Grande Western Railroad Company's General Mortgage, dated February 1, 1924, CITY BANK FARMERS TRUST COMPANY, as Trustee under THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY'S GENERAL MORTGAGE, dated February 1, 1924, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, and HAROLD S. BAIRD,

Respondents.

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